SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 248

MISSISSIPPI POWER & LIGHT COMPANY,
Petitioner,

vs.

MEMPHIS NATURAL GAS COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

Comes Mississippi Power & Light Company, Petitioner herein (as Appellant below Mississippi, under Rule 73(d), Rules of Civil Procedure, and by court order, see Record p. 230, lodged with the District Clerk $40,000 in U. S. Bonds, in lieu of supersedeas bond) and respectfully shows unto this Honorable Court the following:

A

Summary Statement of Matter Involved

This is an action at law for the price of gas sold and delivered by respondent to petitioner. It was brought by Memphis Natural Gas Company, hereinafter called Memphis-Natural, against Mississippi Power & Light Company,

hereinafter referred to as Mississippi, to recover the purchase price of said gas in accordance with a contract between the parties containing a schedule of rates on file with the Federal Power Commission. The petitioner, in its answer and cross complaint, contended that under the contract it was immediately entitled to any lower rates granted by Memphis-Natural to any other buyer similarly situated; that Memphis-Natural so lowered its rates for others, and breached its contract by failing to initiate and file with the Federal Power Commission such lower rates for petitioner as it had granted to others similarly situated. The contract in question was on file with the Federal Power Commission in accordance with the provisions of Section 4(c) of the Natural Gas Act of 1938, 15 U. S. C. A., Sec. 717, et seq., Chapter 556, 52 Statutes 821. The sole questions are whether said Natural Gas Act abrogated the contract and deprived Memphis-Natural of its right to initiate lower rates thereunder; and, if not, whether Memphis-Natural breached its contract in failing to initiate a lower rate for petitioner. The Fifth Circuit Court of Appeals held that the clause in question in said contract, generally known as "the favored nation" clause, became inoperative after passage of the Natural Gas Act. See slip opinion in Cause No. 11,872, rendered June 23, 1947, not yet officially reported: therefore, set out in full as Appendix I to this petition. The effect of the ruling of the Court below is that every such contract, although filed with the Federal Power Commission under the provisions of Section 4 of the Act, was abrogated and annulled by mere passage of the Natural Gas Act of 1938. Not only existing contracts but contracts now being negotiated by petitioner, by respondent, and, in fact, by all companies in this entire industry are struck down by this decision and made *inoperative* although the necessity to file with the Federal Power Commission still exists. The tax clauses, the meter-

ing clauses, the commodity clauses of all such contracts become as stated by counsel for Respondent "meaningless." Why attempt to negotiate and contract at all? A naked schedule of rates is all that is left under this decision. The Court further held that, although inoperative, Petitioner had a remedy under Section 5 of the Act, but that this remedy was exclusive, in effect holding that the Federal Power Commission and not the civil courts could grant relief for breach of a contract of this character.

B

Jurisdictional Statement

Jurisdiction is claimed under paragraph (a) of Section 240 of the Judicial Code as amended February 13, 1925, Chapter 229, Section 1, 43 Statutes 938, 28 U. S. C. A. 347, there being drawn in question by the decision below a Federal question of substantial importance not heretofore decided by this Court. *Brooklyn Savings Bank* v. *O'Neal*, 324 U. S. 697, 89 L. ed. 1296. The Court below having decided that such contracts became inoperative in virtue of the passage of the Natural Gas Act in 1938, the question of the Federal Power Commission's jurisdiction thereasto is here presented. *Interstate Natural Gas Company, Inc., Petitioner*, v. *Federal Power Commission, et al.*, being cause No. 733 on the docket of this Court, decided June 16, 1947.

Further, there is a conflict between the decision of the Fifth Circuit Court of Appeals in this case and the decision of this Court in the case of *Texarkana* v. *Arkansas-Louisiana Gas Co.*, 306 U. S. 188, 83 L. ed. 309. The judgment of the Fifth Circuit here sought to be reviewed was rendered June 23, 1947; Petition for Re-hearing denied July 19, 1947, and the date of the application of Certiorari is the date hereof.

Likewise, there is a conflict between two cases from the Second Circuit and the instant case, to-wit: *Marony* v. *Wheeling & Lake Erie Ry. Co.*, 33 F. (2d) 916, and *Cheatham* v. *Wheeling & L. E. Ry. Co.*, 37 F. (2d) 593. While these opinions are by District Judges, we note that said in the latter case by Judge Woolsey:

> "This defense was before Judge Bondy in the case of Marony *v.* Wheeling & Lake Erie Railway Co. (D. C.), 33 F. (2d) 916, and he granted the plaintiff's motion to strike it out. Even if I did not agree with this ruling, I should feel bound to follow it, for this separate defense is identic with the defense passed on by Judge Bondy. But I agree entirely with his ruling, for a defense of a supervening illegality, which can be cured by proper steps taken in behalf of the party pleading it, is not a good basis for a claim of frustration, which in its essence is an equitable defense.
> • • •
> "I sustain the sufficiency of the complaint in this respect, for it is alleged therein that the plaintiff was 'the holder' of 100 shares of the preferred stock.
> "In doing this I follow Judge Bondy's decision as a matter of the orderly administration of justice in this court for the judges thereof, though eight persons, are one court."

And therefor are cited authorities from the Second Circuit and from this Court, to-wit:

> "Texas Company *v.* Hogarth Shipping Co., Ltd., 265 F. 375 (D. C.), per Judge Hough, affirmed (C. C. A.) 267 F. 1923; 256 U. S. 619, 41 S. Ct. 612, 65 L. Ed. 1123; Impossibility as a Defence, 12 Harvard Law Rev. 501. Cf. also notes in 15 Harvard Law Rev. 63, and 19 Harvard Law Rev. 462."

C

Questions Presented

Memphis-Natural was legally bound by contract with Mississippi to lower its rates. The supervening Natural Gas Act did not prohibit its doing so, but required the reduced rates to be filed with the Federal Power Commission in order to become effective. Memphis-Natural failed to take any steps to comply with its contract. The question for decision on certiorari is: Was its plea of impossibility of performance good or bad? The only prior decision on the subject is that of the lower courts in this case.

The question presented involves the construction of the Natural Gas Act of 1938, and its decision affects the validity of every contract affecting rates that is filed or that may be filed with the Federal Power Commission pursuant to the requirements of said Act. 15 U. S. C. A. 717 (c); 52 Statutes 821, Ch. 556. The Fifth Circuit Court of Appeals in this case held that petitioner's contract for lower parity gas rates became inoperative after passage of said Act. We take this to mean that our contract was abrogated by the Act. A single sentence in the opinion below reveals the whole decision. It is as follows: "The 'favored nation' clause became inoperative after passage of the Natural Gas Act." No other basic issue was decided by either the District Court or the Circuit Court of Appeals. This ruling necessarily conceded all questions of fact in favor of petitioner.

If this Court sees fit, it may limit its inquiry to whether the Natural Gas Act by its mere passage annulled the petitioner's contract for parity of rates. While this suit was brought by respondent, the counterclaim is the most important feature of the case. Petitioner (who was defendant and cross-plaintiff in the District Court and appellant in the Circuit Court of Appeals) makes no contention

as to the amount claimed by respondent in its original action, but by the counterclaim it seeks to offset the amount sued for by respondent and to obtain a judgment over against the latter. The sole issue here is with reference to the counterclaim, which in turn depends upon the validity of clause four of the contract, the validity of which in turn depends upon whether it was abrogated by the Natural Gas Act, and that, of course, depends upon the intention of Congress, which must be gathered from the language of the act.

The decision of which we complain not only destroyed our contract against rate discrimination but, in principle it annulled all similar rate agreements throughout the country. It affects the entire natural gas industry. Until reversed, it will be the law of the land from the Panhandle of Texas to the Florida Keys and from Savannah, Georgia, to El Paso, Texas. Territorially, the Fifth Circuit is the largest judicial circuit in the United States; and probably within its confines is produced more natural gas than in any other circuit. This decision casts a cloud upon vested rights beyond the territorial jurisdiction of the court that rendered it, vast and extensive as is the sphere of its authority. If the decision is reversed, the cause should be remanded to the District Court for a trial of the counterclaim on its merits before a jury. Both the original action and the counterclaim are legal demands.

The petitioner, by its counterclaim, is seeking damages for breach of respondent's contract in failing to initiate a lower and non-preferential rate in behalf of petitioner, which is a public utility. In other words, it is a suit between two public utilities, the respondent being the wholesaler and the petitioner the retailer. The counterclaim is an action ex contractu for damages against the wholesaler for its failure to initiate and file a nondiscriminatory rate. The counterclaim is not based upon the statute or the

common law, but upon a contract which was valid at the time it was made. The respondent claims that this contract against preferential rates was abrogated by a supervening statute that prohibited discriminatory rates. This contention ascribes to Congress a remarkable performance: the annulment of all such contracts and, in the same act, the requirement that all such abrogated contracts be filed with the Commission. Therefore, the primary question here is whether the Congress, in passing an act against rate discrimination, intended to annul a contract that stipulated against it.

A collateral question is whether the Federal Power Commission was given jurisdiction of petitioner's counterclaim for breach of contract. In other words, could the Commission have granted judicial relief, and did the petitioner waive or otherwise lose its judicial remedy by its failure to apply in time to this administrative body? To ask the question is almost to answer it, yet both lower courts held in this case that the Natural Gas Act placed upon petitioner "the power of instituting a hearing to determine whether a rate is proper under the terms of the act," and both held that petitioner should have applied to the Federal Power Commission for relief for breach of contract. The quoted phrase demonstrates that the Court overlooked that "a proper rate" may mean one thing under a contract and quite a different thing under a statute or the common law. A proper rate under a contract might be confiscatory under the general law. City of *Opelika* vs. *Opelika Sewer Co.*, 265 U. S. 215.

Therefore, the court erred in holding that the Commission had power to institute a hearing to determine what should have been the proper rate in this case under clause four of petitioner's contract with the respondent.

D

Reasons Relied On for Allowance of Writ

This case presents a question of national importance to all persons and corporations under the jurisdiction of the Federal Power Commission by virtue of the Natural Gas Act of 1938, because although Section 4 (c), of the Act provides that every natural gas company shall file schedules with the Commission showing all its rates and charges for sale of natural gas, the Circuit Court of Appeals for the Fifth Circuit held that "the favored nation clause became inoperative after the passage of the Natural Gas Act." Thereby the opinion of the Court in this case held either (a) that all contracts containing clauses similar to the one here involved (or other clauses in such contracts though not similar), were annulled and abrogated by the passage of the Natural Gas act or (b) that the effectiveness thereof was limited to proceedings before the Commission and the remedy for a breach of contract was exclusively within the jurisdiction of the Commission, thereby raising the question of the Commission's jurisdiction over cases involving a breach of contract. If mistaken in the above, then the Court below, by its decision herein, is in conflict with the decision of this Court in *Texarkana* v. *Arkansas-Louisiana Gas Co.*, 306 U. S. 188, 83 L. Ed. 309, wherein the operation of a similar favored rate provision was upheld and was held to be self-executing. It is true that this decision was prior to the date of passage of the Natural Gas Act, but so was the contract relied on to support the counterclaim, which contract was filed with the Federal Power Commission. This brings out in bold relief the primary question for decision on the petition for certiorari, i. e., the annulment or not of the "favored customer" clause of the rate contract.

WHEREFORE, Petitioner prays for Writ of Certiorari from this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain therein named a full and complete transcript of the record and all proceedings in the cause numbered 11,872 and entitled *"Mississippi Power and Light Company* v. *Memphis Natural Gas Company"* and that said judgment of the said Court may be reversed and petitioner afforded appropriate relief.

Respectfully submitted,

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801 Standard Life Building
Jackson, Mississippi.

I, E. R. Holmes, Jr., of counsel for petitioner, hereby certify that I have mailed, postage prepaid, a true copy of the foregoing Petition for writ of Certiorari to Hon. E. P. Russell, attorney for respondent, at his usual post office address at Sterick Building, Memphis, Tennessee.

This the —— day of Aug., 1947.

E. R. HOLMES, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 248

MISSISSIPPI POWER AND LIGHT COMPANY,
Petitioner,

vs.

MEMPHIS NATURAL GAS COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Court Below

The opinion of the District Court may be found at page 221 of the Record. The opinion of the Court of Appeals for the Fifth Circuit rendered on June 23, 1947, is attached hereto as Appendix "A" for the Court's convenience, as the same has not yet been reported.

II

Statement of Case

Reference is respectfully made to Summary Statement of Matter Involved in the Petition for Writ of Certiorari.

III

The Facts

The facts, fairly stated in the opinion of Judge Lee, are as follows:

> "Mississippi Power & Light Company, herein called 'Mississippi,' contracted to purchase its natural gas requirements from Memphis Natural Gas Company, herein called 'Memphis,' beginning January 2, 1929. Memphis transports and delivers gas from the Monroe field in Louisiana to Louisiana Power & Light Company, Arkansas Power & Light Company, Mississippi, West Tennesee Power & Light Company, and the Light, Gas and Water Division of the City of Memphis, for resale to consumers.
>
> "After the passage of the Natural Gas Act of 1938, the contract between Mississippi and Memphis was filed with the Federal Power Commission in compliance with section 4 (c) of the act. The contract contained the following provision after the rates were set forth:
>
> > " '• • • It is understood and agreed that if at any time during the continuance of this agreement the Seller shall make any contract or contracts for the sale and delivery of gas to other than the Buyer at prices lower than the prices provided for in this Article Fourth for similar amounts of gas and under similar conditions, the Buyer shall be entitled to purchase gas hereunder at prices as favorable to the Buyer as the prices provided for in any such contract or contracts.'
>
> An amendment to the contract on September 1, 1934, also filed with the Commission, changed the rates for gas purchased but left the foregoing 'favored nation' clause intact. This contract, as amended, provided the only filed rate schedules for gas purchased by Mississippi for the period involved in this suit. On July 26, 1943, the Federal Power Commission implemented new rates for gas purchased and made the new rates appli-

cable to all of Memphis' distributors. Prior thereto, Memphis and the Arkansas Power & Light Company had entered into a stipulation reducing the rates for gas sold by Memphis to Arkansas Power & Light Company, effective during the period from November 1, 1942, to July 26, 1943. Mississippi contends that it is entitled to these lower rates given by Memphis to Arkansas Power & Light Company, by reason of the 'favored nation' clause quoted above. During the period from November 1, 1942, to July 26, 1943, these lower rates would have saved Mississippi $30,044.53. Memphis billed Mississippi at the rates provided in the September 1, 1934, contract, as amended, and Mississippi deducted $30,044.53 from the billings before payment. Memphis brought this suit for the $30,044.53.

"Memphis also entered into an agreement, on March 13, 1939, with its distributor, the Light, Gas and Water Division of the City of Memphis, establishing a rate for gas delivered by Memphis to the City of Memphis. This contract was filed with the Commission on June 15, 1939, and the rates were effective June 27, 1939, to July 25, 1943. Mississippi now contends that it is entitled to the rates given by Memphis to the City of Memphis by reason of the same 'favored nation' clause. These rates were lower than those in effect between Memphis and Arkansas Power & Light Company during the period from November 1, 1942, to July 26, 1943. During the period from July, 1939, to July 25, 1943, the rates set forth in the 1939 agreement between Memphis and the city of Memphis would have saved Mississippi $227,951. Defendant set forth its contention as to this $227,951 in its answer and amended it to counterclaim as to this amount on this appeal.

"During the pendency of the suit in the court below, Mississippi, on April 11, 1945, filed with the Federal Power Commission, a complaint to determine 'the just and reasonable rate for gas delivered at the city gate by Memphis to Mississippi during the period from June 21, 1938, to July 26, 1943, fixing the same by order.' The Commission ruled it was without author-

> ity to grant the relief requested, * * *" as it had no jurisdiction over past rates.

We call the Court's attention to the fact that the Circuit Court, in the foregoing statement, said that Mississippi contends it *is* entitled to the lower rates given by Memphis to Arkansas and to the City of Memphis. Mississippi did not then and does not now contend that it *is* entitled to the *rates*. Mississippi contends that it *was* entitled to require respondent to comply with its contract or to answer in damages for a breach thereof. Mississippi was entitled, we contend, to the rate initiated by Memphis Natural for Arkansas and for the City of Memphis, but it did not obtain that rate. Therefore, what it is now entitled to and what it now contends for is damages for the breach of a valid contractual obligation. Memphis' only defense is frustration and if that defense falls, Mississippi's claims to damages should be heard by a jury in the District Court.

Further, although throughout the record it is clear that only the price of gas sold the petitioner for resale to domestic consumers is involved, the opinion of the Circuit Court is much broader in its scope than necessary to a decision in this case. The Court held that "the 'favored nation' clause became inoperative after passage of the Natural Gas Act," yet the "favored nation" clause applied not only to gas sold for resale to the public for domestic use, but also to gas sold for other purposes *not within the jurisdiction of the Federal Power Commission under the Natural Gas Act*. For example, it applied and was admittedly operative as to gas sold to petitioner by respondent for petitioner's own use. If, for no other reason than this alone, this Court should grant certiorari here, the question of the Federal Power Commission's jurisdiction being so broadened by the decision complained of as to cover sales of gas *not* for resale to the public.

IV

The Argument

1. The "favored nation" clause was a part of the rate contract between the parties and under it Mississippi was immediately entitled to the same rate reductions granted Arkansas without any affirmative action on the part of either party, this rate being on file with the Federal Power Commission, and as shown by the contract between Memphis Natural and Mississippi, Record pages 29 and 30, Article Fourth of such contract contained:

As Paragraph (a) thereof, the specific rate for gas purchased for resale to domestic consumers.

As Paragraph (b), rates for gas purchased for consumers other than domestic, being commercial, commercial heating and industrial consumers.

As Paragraph (c), the rate for all other gas delivered by seller to buyer, including "unaccounted for gas" and gas not sold to the public, but used by the buyer for its own purposes.

Then the next paragraph of the same article contains two sentences, the first being a sentence whereby any increase or decrease in the gas severance taxes of Louisiana would accordingly increase or decrease the rates; and the second sentence being known as the "favored nation" clause, which is as follows:

> "• • • IT IS UNDERSTOOD AND AGREED THAT IF AT ANY TIME DURING THE CONTINUANCE OF THIS AGREEMENT THE SELLER SHALL MAKE ANY CONTRACT OR CONTRACTS FOR THE SALE AND DELIVERY OF GAS TO OTHER THAN THE BUYER AT PRICES LOWER THAN THE PRICES PROVIDED FOR IN THIS ARTICLE FOURTH FOR SIMILAR AMOUNTS OF GAS AND UNDER SIMILAR CONDITIONS, THE BUYER SHALL BE ENTITLED TO PURCHASE GAS HEREUNDER AT PRICES AS FAVORABLE TO THE BUYER AS THE PRICES PROVIDED FOR IN ANY SUCH CONTRACT OR CONTRACTS."

This was the contract initially made in 1928 between the parties and filed as amended in 1934 with the Federal Power Commission after the passage of the Natural Gas Act in 1938 in accordance with the mandate of the Act. In 1941, Memphis Natural voluntarily reduced its rates to Arkansas and thereupon Mississippi was immediately entitled to that which the law and its contract gave it absolutely and unconditionally, to-wit: just, reasonable and non-discriminatory rates under Section 4 (a).

Compare *United States* v. *United Gas Corporation*, 5 Cir., 134 F. 2d 339; *Union Dry Goods Co.* v. *Georgia Pub. Service Corp.*, 248 U. S. 372, 63 L. Ed. 309; and see, especially, *Texarkana* v. *Arkansas-Louisiana Gas Co.*, 306 U. S. 188, 83 L. Ed. 598, wherein the twin cities of Texarkana, Texas, and Texarkana, Arkansas, had contracts with the Arkansas-Louisiana Gas Company whereby, under Section 9, if a lesser rate was granted the city of Texarkana, Arkansas, such rate should apply to the City of Texarkana, Texas. A rate reduction in Texarkana, Arkansas, was granted and the application of this clause was questioned for decision in this suit. In construing the self-executing nature of the clause the court said:

> "The lower rates for Texas are to be effective only when the utility is 'finally compelled to, or should voluntarily, place in' effect the lower rates for Arkansas. When a rate is voluntarily placed in effect in Arkansas, the Texas consumers are immediately entitled to the same rate. We construe 'finally compelled' as meaning the entry by a court of the final order which makes effective a challenged rate order. No right to demand the lower rate and no cause of action to enforce the right arises until that time. When such order is entered, however, the Texas consumers are entitled to have the lowered rate applied to their consumption for the same period of time it is enjoyed by the Arkansas consumers. The purpose of the clause was to give Texas consumers the advantage of lower Arkansas rates for similar

periods of time. Litigation, regardless of its merit, may not stay the beginning of the lower Texas rate. * * *"

This Court reversed the Court of Appeals for failing to pursue the course wherefore we herein contend.

Note that Respondent (seller) expressly covenanted that Petition (buyer) "shall be entitled to purchase gas hereunder at prices as favorable to the buyer as the prices provided for in any such contract or contracts," thus directly imposing upon the Respondent the affirmative duty to sell, *including, if essential, the precedent performance of any essential step,* but this contract should be construed *ut res magis valeat quam pereat,* and to such construction, Respondent has breached its faith. The obligation here is, if possible, to make effective that which the parties thus agreed upon and we submit that Respondent, having only five customers, well knew that by thus granting Arkansas this reduction, it immediately thus did as to Mississippi, for under the most favored rate clause it would be an anomoly to compel the negotiation of a new treaty after the party thus bound had given by a precedent treaty the rights claimed.

Our position is that the granting to Arkansas *per se* gave these rights to Mississippi and Respondent, under this contract, could not insist that Petitioner negotiate a separate and additional contract for those rates whereat Respondent had specifically contracted that Petitioner could purchase; but if the Court does not assent, then consider

2. *The "favored nation" clause not frustrated by the Natural Gas Act.* The issues of fact as to comparable or similar rate conditions present themselves first with reference to the City of Memphis; second, with reference to the Arkansas situation. If Clause Four was breached by Respondent's failure to grant Petitioner the Memphis rate, the amount of damages was $227,951.11, and the period

ran from June 28, 1939, to July 26, 1943. If Petitioner was entitled to the lower rate granted Arkansas by Respondent, the amount involved was $30,044.53, and the period of time was from November 1, 1942, to July 26, 1943. This amount was the exact amount of our off set or recoupment for this period and is in addition to the $227,951.11 sum above mentioned.

There were two witnesses that testified on these issues, Mr. E. P. Russell, Attorney for Respondent, and Mr. Henry B. Sargent, Vice-President of Mississippi Power & Light Company. Mr. Russell, in his testimony, shows that it was not until December 29, 1942, that Mr. Sargent, Vice-President of Mississippi Power & Light Company, learned of the Arkansas reduction and wrote Memphis Natural inquirying with reference to it. Mr. Russell states that it was February 22, 1943, before Mr. Sargent knew, except in a general way, about the Arkansas domestic rate reduction. At that time, at a conference in Memphis, Mr. Sargent contended that Mississippi was entitled to a similar reduction. In that conference, according to Mr. Russell's deposition, the Memphis Natural officials pointed out that the question of a complete revision of its rate structure was then before the Federal Power Commission, and as they said, Mississippi would gain very little by attempting to secure a reduction similar to that granted Arkansas, and, as Mr. Russell stated, "for these reasons we urged Mr. Sargent to withhold filing a complaint with the Federal Power Commission for the purpose of securing a reduction in the domestic gas rate for the Mississippi Power & Light Company, as the Commission was then working on the problem and some rearrangement of price schedules was imminent."

Then, in a letter written by Mr. Russell on March 12, 1943, he urged that Mississippi take no action for ten days or two weeks more and, in response to that request, no

action was taken until the overcharges were deducted, beginning March 25 (R. 120-121).

The proof as to "similar conditions" in City of Memphis and in Mississippi presents a factual question which should be decided by a judge or jury but the proof as to similar conditions in Arkansas is so overwhelming that a finding to the contrary would have been clearly erroneous if one had been made; but here, too, the court below contented itself by saying that there was a factual situation where the court or the commission might have found with Petitioner, but that the Respondent had the right to have that question litigated. This was a right which evidently the Respondent preferred to enjoy only in theory, because on each occasion when the opportunity to litigate the question was offered, it managed to win the case without that issue being decided. So that, this being an action at law and the counterclaim for damages being strictly a legal demand, we say that for the purposes of this appeal the court will proceed upon the postulate that the factual conditions in Arkansas and Tennessee were similar to those in Mississippi for rate-making as to domestic consumers, and that *the Respondent breached its contract if clause four was still in effect.* Under such conditions there is a direct conflict between the judgment of the Fifth Circuit here and the decision of this Court in the case of *Texarkana* v. *Arkansas-Louisiana Gas Company,* 306 U. S. 188, 83 L. Ed. 309 .

That leaves for decision in this Court the sole question as to whether clause four *was valid and breached,* as Petitioner contends, or *was abrogated and superseded* by the Natural Gas Act, as Respondent contends.

It is apparent from the Russell-Zinder letter (R. 114-119), Zinder being chief of the rate division of the Federal Power Commission, that Memphis-Natural, for reasons satisfactory to itself, was loath to grant to Mississippi the low rates

resorted to in the case of Arkansas "for the purpose of meeting a temporary exigency"; that exigency being the insistence of Arkansas that a lower rate had been granted the City of Memphis and that the difference between the rate charged by Respondent to the City of Memphis and the Arkansas Power & Light Company was unreasonable, unjust, unduly discriminatory, and could not be justified by any difference in cost. In this letter, Mr. Russell said:

> "It has been suggested that the Memphis Natural Gas Company should extend to the Mississippi Power & Light Company and the West Tennessee Gas Company the same rates for domestic gas now in effect in Arkansas pursuant to the compromise disposition of the above-mentioned complaint by the Department of Public Utilities of the State of Arkansas. At the time of our conference we made the point that the Memphis Natural Gas Company is in no position to do this as its properties cannot be maintained in a healthy condition to serve the public if it is required at this time to so reduce the rates in Mississippi and West Tennessee."

In other words, the Respondent could not afford to comply with its contract. Therefore, it was "a very great surprise" to Respondent when Mississippi's patience was exhausted and it deducted the overcharge, which forced the matter into litigation. At least, it was Respondent's duty to make an effort to comply with clause four, but it never turned its hand in that direction. In fact, Mr. Russell testified that if Mississippi had filed a complaint with the Commission, the Memphis Natural Gas Company would have resisted it. We take this to mean that even a timely complaint as to future rates for the period here involved would have been resisted. Thus Mississippi could have done nothing to get parity of treatment during the period in controversy that would have met the acquiescence of the Memphis Natural Gas Company.

Yet Respondent was indignant when "so good a utility executive as Mr. Sargent" resorted to his lawful remedy of self-help to collect damages for breach of a valid contract. This amounted to no more than exercising the right of set-off or recoupment. If a debtor owes the creditor, what is so outrageous about recoupment?

Many strange things have been ascribed to legislative bodies and doubtless they have done some of them, but nothing more unreasonable could be devised than the respondent's contention that, in enacting the Natural Gas Act, the Congress intended to abrogate the very contracts that it was requiring to be filed with the Commission within a time to be designated, not less than sixty days from the effective date of the Act. The very language of Section 4(c) of the Act with reference to filing schedules of rates and charges terminates as follows: "together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." Not less than sixty days after all such contracts had been abrogated, annulled, rendered meaningless, and become inoperative, it is contended that Federal legislators enacted that such contracts be filed (entombed might be a better word) with the Federal Power Commission. If Congress intended to invalidate all such contracts by mere passage of the Natural Gas Act, and wanted them preserved, they could have been filed with the Department of Archives and History, not with the Federal Power Commission.

We are unable to discern any rational basis for the contention or ruling that Congress intended both to abrogate all rate contracts and to require them to be filed with the Commission. What it intended, we submit, was to delegate to the Commission the power to abrogate, supersede, or modify such contracts, after notice and a hearing, in the exercise of a sound discretion, if it saw fit. The whole scheme of the Act shows that both legislative and adminis-

trative powers and duties were being delegated to the Commission, but there is nothing in the Act to indicate that any purely judicial powers were being delegated; even if it be conceded that the latter might have been done, which is denied. The fact that the Commission had the delegated power to annul the contract did not destroy its binding effect upon the parties so long as the Commission had not disturbed it by affirmative action after notice and hearing. The record shows without dispute that this contract was not disturbed by the Commission during the period in controversy.

At common law the primary right to initiate rates rested with the utility. 51 Corpus Juris, Sec. 25. The lower court did not discuss this universally recognized principle except to say that no matter how the petitioner might distort the effect of the favored nation clause, the Act placed upon it or the Commission itself the power of instituting a hearing to determine whether a rate was proper under the terms thereof. The Circuit Court refused "to place a contractual duty on Memphis to file a new rate schedule." The fact is that Memphis, by contract, voluntarily assumed that duty; and, upon the undisputed facts, the court's interpretation of the statute relieved the utility of this contractual duty. Compare *Perry* v. *United States*, 294 U. S. 330, 79 L. Ed. 912.

If there had been no Natural Gas Act, Memphis Natural would undoubtedly have been under a duty to initiate a new rate similar to the one granted Arkansas and Memphis. No provision of the Act and no order of the Commission relieved it of that duty. The Circuit Court quotes Section 4 of the Act to the effect that no change shall be made in rates except after thirty days' notice. This may have delayed the performance of the duty thirty days, but it did not relieve the duty entirely. The respondent was required

to initiate and file a new rate; and if the law delayed the effective date thereof, that was damage without injury, but here the respondent did nothing to comply with its contract, vainly claiming that its hands were tied as to Mississippi, while demonstrating that they were not tied as to Arkansas or Memphis.

During the oral argument of this case in the Circuit Court of Appeals, a member of the court asked the following question: "If appellant were permitted to recover upon its counterclaim, would we not be permitting you to do indirectly what could not be done directly?" The answer was no, because it could and should have been done directly. The basis of the counterclaim is the respondent's failure to do directly what it had unequivocally promised to do, that is, to grant Mississippi parity of rates with Memphis and Arkansas, conceded arguendo to be similarly situated. The direct way to comply with this agreement was for respondent to initiate lower rates for Mississippi and file the same with the Federal Power Commission. The law might have delayed temporarily the effective date of these lower rates, but there is no reason to presume that the Commission would not have granted a request of the utility for the lower rates to take effect immediately if such request had been made. This is not all: a temporary delay in the effective date of a change of rates would only have reduced the petitioner's legal damages. Even the Commission could not have suspended the operation of the lower rates without a hearing except for a limited period. Compare 15 U. S. C. A. 717(c). Far from being impotent in the initiation of rates, it is not only the privilege but the duty of every utility to prescribe rates for its services. Time and again it has been held that the initiation of rates lies with management, not with regulatory bodies. There is no defense in this record to the counterclaim unless the

Supreme Court holds, as both lower courts held, that the paramount power of Congress put an end to clause four of the contract by mere passage of the Natural Gas Act.

To hold that a law against preferential gas rates impliedly abrogated a contract for equality of lower gas rates is a palpable nonsequitur. In passing an act against rate discrimination, it is unthinkable that Congress intended to annul a contract that stipulated against it. Yet that is exactly what the lower court has held. The contract stipulated for the purchase of gas at prices as low and favorable as those granted to any other buyer similarly situated. The Natural Gas Act forbids any undue preference or advantage to any person, and prohibits any unreasonable difference in rates between persons, localities, or classes of service. There is no conflict between any provision of the law and the contract. The statute and the contract are in perfect accord. The contract was not stricken down, but was sustained and strengthened, and the way left open for its performance, by the statute, just as was true in *Cheatham* v. *Wheeling & L. E. Ry. Co.*, 37 F. (2d) 593.

In one sense, the contract in question may have been impaired but in no sense was it annulled or rendered void by the Natural Gas Act. To impair means to weaken or diminish in effectiveness, and since under the Act a new rate must be filed with the Commission, and may be temporarily delayed in taking effect in the absence of a special order of the Commission, the contractual obligation to initiate a new and non-discriminatory rate was to that extent (let us say) impaired; but strictly speaking, this regulation did not impair the obligation of the contract. It was only an impediment in the path of its performance, which was negligible in comparison with the holding below that the contract became inoperative after passage of the Act.

The full period of discrimination in this case (admitted arguendo) ran from July, 1939 to July, 1943. The four years of discriminatory rates that were exacted from petitioner have unjustly enriched the respondent in the sum (the amount being undisputed) of $227, 951.00. Upon the subject of unjust enrichment, we quote the following from Clark on Contracts, 3rd Edition, Hornbook Series, page 623:

> "Ordinarily, a person can only maintain an action ex contractu against another by proving a contract in fact. There are circumstances, however, under which the law will create a fictitious promise for the purpose of allowing the remedy by action of assumpsit. The obligation is not a contract, but a quasi-contract. It may be founded—
>
> "(a) Upon the judgment of a court;
>
> "(b) Upon a statutory, official, or customary duty; or
>
> "(c) Upon the principle that no one ought unjustly to enrich himself at the expense of another." 19

Note 19 of the text is as follows: 2 Harv. Law Rev. 64, III Select Essays in Anglo-American History, 293; *Bloomington Tp. Bd. of Highway Com'rs* v. *City of Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913 A, 471. A mere procedural delay in performance of an obligation is quite different from its absolute annulment or avoidance. No State shall pass any law impairing the obligation of contracts is the language of the Constitution. Art. 1, Sec. 10, par. 1. Thus the States were not only forbidden to annul a contract, but to diminish its obligation in quantity, value, excellence, or strength. The word *impair* was evidently carefully chosen by the founders for the purpose they had in mind. Shall we ascribe to the Congress less discrimination in choosing the words of the Natural Gas Act? Was it

intended to annul all such contracts or merely to regulate the method of their performance and to delegate to the Commission the power to annul them? The answer to the latter question may be gathered from Section 717c and d of the Act.

Section 717c declares that all rates for the sale of natural gas shall be just and reasonable, and that any such as are not shall be unlawful. It forbids any undue preference or advantage or the maintenance of any unreasonable difference in rates. It requires the filing with the Commission within sixty days of its passage of all schedules of rates, together with all contracts which affect or relate to such rates. Unless the Commission otherwise orders, it forbids a change in rates except after thirty days' notice, which shall be given by filing the new schedule with the Commission. The latter is given broad authority to enter upon a hearing as to the lawfulness of any rate; and, after a hearing, to fix such rate as it shall find just and reasonable. The Commission has no power to increase the rate in any currently effective schedule "unless such increase is in accordance with a new schedule filed by such natural gas company; (This is proof positive that the statute did not deprive the utility of its common law right to initiate new rates unless it is contended that the right to lower rates was taken away from the utility though the right to increase them remained, which would be absurd.) but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." Section 717 d(a). Thus the continuation of the power of management to initiate new rates was clearly implied; it was broader than the power of even the Commission, which has no power to increase any rate (see proviso in (a) of 717d); it was the same as it originally was when the contract was

made wherein Memphis Natural promised Mississippi the benefit of such lower rate as was granted by it to any other buyer similarly situated. Now if it has been demonstrated that respondent retained the right to initiate lower rates and to file them with the Commission, it follows that its contract to lower its rates was not in violation of the Natural Gas Act and was breached by its failure to do so.

The Commission was given no jurisdiction of causes of action for contractual violations. To quote respondent: "The civil courts are the proper forum for such contention." To quote the Commission, it was "without jurisdiction to fix rates for prior periods." If Congress was going to delegate to the Commission the power to abrogate rate contracts, and was going to require utilities to file all such contracts with the Commission, being careful to provide for a hearing before the Commission—all of which it did, it would never in the same statute have abrogated or annulled all interstate rate contracts. To have done such an unreasonable and destructive thing should not be inferentially ascribed to the legislative branch of the Government.

We have conceded the power of Congress to abrogate rate contracts. We also concede that Congress could and did delegate such power to the Commission. In short, the Congress could elect to do one or the other, but in the nature of things it could not do both, and did not attempt to do both. What it did was to delegate full power in the matter to the Commission. The opinion of the Circuit Court of Appeals is silent as to which course was adopted in this case. It merely states that petitioner's contract became inoperative *after* the passage of the Natural Gas Act. Strictly speaking, this would imply that it was not annulled by the Act itself. From it, we might infer that the contract was avoided by some order of the Commission,

but the Court did not so hold, and the record shows that there was no such order. Thus we are not told when, how, by whom, or by what authoritative act, petitioner's vested right was destroyed. The petitioner is entitled to know when its contract was abrogated, and whether it was done by the paramount power of Congress or the delegated power of the Commission.

Respondent said the contract became meaningless after passage of the Natural Gas Act. The Circuit Court of Appeals used the word "inoperative", but neither was specific as to whether the coup de grace was given by the Act itself or under the delegated power of the Commission. It is important to know, because the Commission could only act upon a hearing, after notice. Without something more definite as to when the lower rate provision of our contract was knocked out, the mystery will remain unanswered.

The case of *Cheatham* v. *Wheeling & L. E. Ry. Co.*, 37 F. (2) 593, announces the principle for which we are contending in this petition. It holds that the defense of supervening illegality, which can be cured by proper steps taken in behalf of the party pleading it, is not good as a basis for the claim of frustration, which in its essence is an equitable defense. As we have heretofore pointed out, the respondent, by proper steps before the Federal Power Commission, could have complied with its contract. All it had to do was to file the lower rate with the Commission and let it take effect in due course, or to file it and apply to the Commission for it to take effect immediately. The respondent was fully aware of the provisions of its contract, and should have taken steps to meet its obligations thereunder. Having failed to do this, it cannot plead supervening illegality as a defense thereto. As stated in the just-cited case, this is an equitable defense, and respondent is not entitled to plead it. Unless respondent's plea of super-

vening illegality (the enactment of the Natural Gas Act) was properly sustained, then there is no legal defense to the counterclaim in this record, and the judgment below should be reversed.

The case of *L. & N. R. Company* v. *Mottley,* 219 U. S. 467, arose under the Interstate Commerce Act, as amended, which is an entirely different statute from the Natural Gas Act.

To distinguish with particularity the *Mottley* case from the one now being presented to the court, it is only necessary to mention that the Interstate Commerce Act, as construed, required the carrier to accept only money in payment for transportation on its road. Mottley's contract with the railroad called for an annual pass for himself and wife in consideration of their having released the company from all claims for damages for personal injuries received by them in consequence of a collision of trains on the railroad of said company. This contract was held to be in direct conflict with the amendment of 1906, which prohibited the carrier from demanding or collecting a greater, less, or *different* compensation for transportation than the rates specified in its published tariffs. There was no provision for the filing of existing contracts with shippers or passengers (and no method of making them public) defined in the statute. This court held that the evident purpose of Congress was "to cut up by the roots" every form of discrimination, favoritism, and inequality, except in certain classes to which Mottley and his wife did not belong. Mottley's contract was stricken down because it required the carrier to accept different and discriminatory compensation. Moreover, he was seeking specific performance of an act which had become illegal by supervening legislation. He was not suing to recover damages or to restore former

rights as to which the court expressly reserved its opinion. 219 U. S. 486.

In the instant case, the Natural Gas Act required the contract to be filed with the Federal Power Commission, and it was so filed in accordance with the statute, which also was intended to cut up discrimination by the roots. But the contract in this case was not in defiance of the statute. It did not call for any different or discriminatory rate or charge. It called for the same rate as that given other buyers similarly situated, which rates were on file with the Power Commission. The Natural Gas Act did not prohibit the respondent from performing its contract. It specifically defined the procedure by which it might have been performed. The door was left open by the statute for lower rates, the way was clear, the contract was on file, the lower rates to petitioner's competitors were on file. Nothing was lacking to make these lower rates applicable to Mississippi except the compliance of respondent in fulfillment of its contract. This was deliberately withheld, as shown by the record, under the specious plea that the Natural Gas Act prohibited respondent from lowering its rates in performance of its contract. Memphis Natural was bound in double trust and duty to lower its rate. Mississippi's remedy was judicial under the contract, administrative under the statute.

Clause four of the contract simply required respondent to give petitioner the benefit of any lower rate that was granted any other buyer similarly situated. The common law, the statute, the contract, all were in perfect accord. The contract afforded a judicial remedy for its breach, whereas the statute provided an administrative remedy against discriminatory and preferential rates. Supervening legislation in perfect harmony with a pre-existing contract is not a defense to an action for breach of the con-

tract; and yet the lower court held that it was. There was no specific holding that the contract had become void. The words suspended, superseded, abrogated, annulled. or invalidated, were not used. The court said the contract had become *inoperative;* respondent averred it had become *meaningless;* and the petitioner was turned away for the vague reason that supervening legislation had left it remediless in a court of justice. A contract for equality of rates was impliedly invalidated by a statute against inequality of rates. We urge the court to look into this matter.

One who pleads force majeure or supervening legislation as an excuse for non-performance of a contract must show that the superior force or paramount authority was a real and substantial obstacle to performance. The fact that Congress or the Commission might have annulled the contract did not destroy its binding effect between the parties when it was left undisturbed during the crucial period. *Southern Utilities Company* v. *Pelatka,* 268 U. S. 233. Moreover, rates fixed by a valid contract are enforceable even though they would be confiscatory under the police power. *City of Opelika* v. *Opelika Sewer Company,* 265 U. S. 215. Without denying the constitutional power of Congress to abrogate clause four of the contract relied on to support the counterclaim, petitioner emphatically denies that such power was expressly or impliedly exercised by Congress in the passage of the Natural Gas Act. We deny that it was unlawful for respondent to grant petitioner a lower rate by filing same with the Federal Power Commission and taking ordinary procedural steps to have such rate approved.

See notes to Harvard Law Review, Vol. 15, pp. 63, 64; Vol. 19, pp. 462 and 463. These notes stress the equitable nature of the defense of impossibility of performance, and

suggest that, even where the defense is allowed, it seems highly unjust to throw all the loss on the one whose performance has been prohibited. Much wiser, it is said, would it be to excuse the breach of the express contract and allow a recovery for damages in a quasi-contractual action. Of course, where the contract relied on has not been invalidated, a pure action for damages ex contractu is permissible. Cf. *Maroney* v. *Wheeling & L. E. Ry. Co.*, 33 F. (2) 916, 917, wherein the court said:

> "The defendant cannot plead as a defense that it was unlawful to convert upon presentation and surrender, *in view of the fact that the defendant had failed to make application to the Commission for approval*". (Emphasis supplied).

See also *Murphy* v. *North American Company*, 24 Fed. Supp. 471; same case 106 F. (2) 74.

In this case, where certiorari is now being sought, the above principles are particularly applicable, because during the period for which recovery is sought the contract provided for parity of rates, and subsequent to the same period the Federal Power Commission ordered parity of rates. For the period in controversy, it seems just and reasonable that petitioner should be permitted to recover damages ex contractu for respondent's failure to initiate the lower rate to which petitioner was entitled under it contract. This was positively required as a matter of law if performance of clause four of the contract was not prohibited by the Natural Gas Act; it is equitably required in a quasi-contractual action, to prevent one of the parties from being unjustly enriched, even if the performance of the contract was prohibited by the Natural Gas Act.

Instead of prohibiting performance of the contract in question, the Natural Gas Act merely limited the method of performance and prescribed the procedure for it. The

applicable general law is written into every valid contract. Prior to the Natural Gas Act, the respondent was bound under clause four to initiate a lower rate and put it into effect immediately. It could do that without asking any one's leave. After its passage, performance was restricted to the procedure defined in the Act. At all times the matter was subject to the paramount power of Congress, but its intention to abrogate valid contracts for lower rates was not evinced in the Act or elsewhere, either expressly or by necessary implication. If a contractual obligation may be cumulative to a legal duty (as is often true when a common carrier is the bailee of goods), we dare say that even now respondent may enter into a stipulation such as clause four to initiate a lower rate and file the same with the Commission. Reading the Act into clause four of the contract, that was its duty in this case. Of course, such new contract would have to be filed with the Commission.

Doubtless, all will agree that the most-favored-customer clause was valid when made; also that it is the obligation of the contract, and not the contract itself, which is claimed to have been excused by supervening prohibitory legislation. It must also be conceded that there was no express abrogation of said contract or annulment of its obligation but that if performance of said obligation became unlawful under the Act, then this was an excuse for non-performance. Whereas, if the obligee could consistently comply with both its obligation under the contract and its duty under the Act, it was contractually and legally bound to do so: provided the added duty was not unreasonably burdensome. It is elementary that the provisions of the Act became a part of the contract, and the contract governed wherever there was no absolute inconsistency between the two. No such inconsistency has been shown. Therefore, the obligation of the contract to initiate lower rates stands, to which

is added the slight duty of filing said lower rates with the Federal Power Commission. One test mentioned by the Supreme Court as to whether the plea of supervening prohibitory legislation was good or bad was whether the parties might legally enter into the same contract after passage of the new legislation.[a] By this test the respondent's plea must be held bad, because gas companies not only might have but, since passage of the Act, actually have made new contracts, simply adding thereto a provision for the utility to file same with the Commission. As to the old contracts, including the one now in suit, we have already pointed out that the supervening Natural Gas Act wrote that requirement into each previously existing contract.

What a Herculean task the logic of the ruling below places upon the Federal Power Commission! If the Natural Gas Act rendered inoperative all previously existing contracts for lower rates, it did so because the Act prohibited the execution of such contracts in the future. This logically would place the initiation of all new or altered rates upon the Commission because, if the power to initiate new rates were taken away from the utilities, only the Commission could initiate new rates or alter old ones. Even if, as the Court of Appeals held, the duty was upon the gas distributor to apply to the Commission, the latter would have the sole power of determining what the rate should be. That

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[a] "After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established. . . . We forbear any further citation of authorities. They are numerous and all one way. They support the view that, as the contract in question would have been illegal if made after passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made." *L. & N. R. R. Co.* v. *Mottley*, 219 U. S. 483, 485. The converse of this rule is undoubtedly true. If the contract in question would have been legal if made after passage of the Natural Gas Act with all consistent provisions written into the contract as a matter of law then it is legal and can be enforced.

management was stripped of this power is the irresistible conclusion to be drawn from the holding below that the "'favored nation' clause became inoperative after passage of the Natural Gas Act." By that clause the respondent agreed to give petitioner the benefit of a lower rate. To the respondent's obligation under the contract to initiate a lower rate, the new legislation superimposed the duty to file the lower rate with the Commission and to petition that it take effect immediately. This was all that respondent had to do in order to fulfill its obligation under the most-favored-customer clause. If it had done that it would have violated no law and yet would have performed its contract. Respondent does not deny that it made the contract; it admits its failure to perform its obligation under it. Its sole plea is that performance was unlawful under the Natural Gas Act. How hollow is such a plea, how lacking in substance, when a three cent stamp would have transmitted to the Commission a short written request to put the lower rate into effect immediately. Aye, would have made it even retroactive, as was done for Arkansas.

The plea of *vis majeure,* impossibility of performance, or supervening prohibitory legislation must rely upon something more than these simple regulations as being prohibitory and unlawful. This is not sufficient to excuse non-performance and to warrant the unjust enrichment of respondent. What is the supervening legislation that prohibited performance in this case? It can not be found in the Natural Gas Act. The obligation of the contract only required the respondent to lower its rates to the level of rates granted Arkansas and City of Memphis. The supervening Act added the simple duty of publishing the rates by filing the same with the Federal Power Commission. If respondent had done this, and the Commission had done nothing, the lowered rate would have taken effect in

thirty days. Whereas, by reason of respondent's failure to perform its contractual obligation, four years elapsed before the Commission got around to correcting the discriminatory rates against Mississippi. Probably it is for this reason that utilities are still obtaining gas customers by entering into rate contracts with them and filing the contracts as required by law. They find the Natural Gas Act no obstacle to the execution of new contracts with new customers, though respondent claims it was an insuperable obstacle to the performance of an old contract.

The truth is that respondent needed no one's consent but its own to fulfill its obligation to petitioner, and that consent was withheld for four long years in violation of its contract, which resulted in the damages now sought to be recovered by the counterclaim. Undoubtedly, in view of the holding below, this Court will be astonished upon reading the Act to find that it did not render performance unlawful or impossible, but left intact the power of the utility to initiate new rates, merely prescribing how they should be published and delaying the date of their taking effect only thirty days. It is immaterial that the Commission had the delegated power to suspend or set aside the altered rates so long as such power was not exercised during the period in controversy. *Southern Utilities Co.* v. *Palatka,* 268 U. S. 233.

3. The Court of Appeals held the "favored nation" clause inoperative in its entirety, notwithstanding it applied to sales outside of the Natural Gas Act. Said Judge Lee:

> "The favored nation clause became inoperative after the passage of the Natural Gas Act."

But the favored nation clause applied not only to gas sold for resale to the public for domestic use, but also to gas sold for other purposes not within the jurisdiction of the

Federal Power Commission under the Natural Gas Act. For example, it applied and was admittedly operative as to gas sold to Petitioner by Respondent for Petitioner's own use and it likewise applied to "unaccounted for gas." If for no other reason than this alone, this Court should grant certiorari, the question of Federal Power Commission jurisdiction being so broadened by the decision of the Fifth Circuit as to usurp the State's powers and situations not to it committed by the Congress. Compare *Connecticut Light & Power Co.* v. *F. P. C.*, 324 U. S. 515, 89 L. Ed. 1150; *Panhandle E. Pipe Line Co.* v. *F. P. C.*, 324 U. S. 635, 89 L. Ed. 1241; *Colorado Interstate Gas Co.* v. *F. P. C.*, 324 U. S. 581, 89 L. Ed. 1206; *F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 88 L. Ed. 333.

Conclusion

We submit finally these propositions:

1. The Act did not abrogate the contract between the parties;

2. If Respondent gave a lower rate to another Buyer similarly situated, Mississippi, Petitioner here, was entitled to such reduced rate;

3. Respondent had the right either to (a) treat Clause Four of the contract as self-executing and bill Mississippi accordingly, (b) file with the Federal Power Commission a schedule of lower rates, or (c) deny, as it did, the applicability of the clause, in which event it acted at its peril; and

4. Respondent had the corresponding right to resort to any lawful remedy if Respondent breached the contract. Petitioner could and did resort to the remedy of recoupment or self-help initially and then to the remedy of defense by way of recoupment and set off in a court of law in this case.

The facts as to Respondent's breach are admitted and the similarity between the domestic consumers in Tennessee, Arkansas and Mississippi have been proven by uncontradicted testimony.

This case presents issues of the utmost importance. It has been featured in the Law Week and has been made the subject of divers inquiries from the law review editors and other persons interested in the meaning and scope of the decision and to leave in effect the decision as rendered by the Court of Appeals would be to plunge the entire industry into a sea of uncertainty. The Court of Appeals has said:

> "The 'favored nation' clause became inoperative after the passage of the Natural Gas Act."

We do not know when, how or why it was rendered inoperative and no specific statute or rule was referred to as that on which the Court could place any such broad declaration. Rectification and clarification are requisite in this important industry thus left to grope in the darkness where before this decision, the rights of the respective parties were assumed to be known with certainty.

Respectfully submitted,

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I, E. R. Holmes, Jr., of counsel for petitioner, hereby certify that I have mailed, postage prepaid, a true copy of the foregoing Brief to Hon. E. P. Russell, attorney for respondent, at his usual post office address at Sterick Building, Memphis, Tennessee.

This the— day of Aug., 1947. E. R. HOLMES, JR.

APPENDIX I

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11872

MISSISSIPPI POWER & LIGHT COMPANY, *Appellant*,

vs.

MEMPHIS NATURAL GAS COMPANY, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(June 23, 1947)

Before Sibley, McCord, and Lee, Circuit Judges

LEE, *Circuit Judge:*

Mississippi Power & Light Company, herein called "Mississippi," contracted to purchase its natural gas requirements from Memphis Natural Gas Company, herein called "Memphis," beginning January 2, 1929. Memphis transports and delivers gas from the Monroe field in Louisiana to Louisiana Power & Light Company, Arkansas Power & Light Company, Mississippi, West Tennessee Power & Light Company, and the Light, Gas and Water Division of the City of Memphis, for resale to consumers.

After the passage of the Natural Gas Act of 1938,[1] the contract between Mississippi and Memphis was filed with the Federal Power Commission in compliance with section 4(c) of the act. The contract contained the following provision after the rates were set forth:

> "* * * It is understood and agreed that if at any time during the continuance of this agreement the Seller shall make any contract or contracts for the sale and delivery of gas to other than the Buyer at prices

[1] 15 U. S. C. A. § 717, et seq., June 21, 1938, ch. 556, 52 Stat. 821.

> lower than the prices provided for in this Article Fourth for similar amounts of gas and under similar conditions, the Buyer shall be entitled to purchase gas hereunder at prices as favorable to the Buyer as the prices provided for in any such contract or contracts."

An amendment to the contract on September 1, 1934, also filed with the Commission, changed the rates for gas purchased but left the foregoing "favored nation" clause intact. This contract, as amended, provided the only filed rate schedules for gas purchased by Mississippi for the period involved in this suit. On July 26, 1943, the Federal Power Commission implemented new rates for gas purchased and made the new rates applicable to all of Memphis' distributors. Prior thereto, Memphis and the Arkansas Power & Light Company had entered into a stipulation reducing the rates for gas sold by Memphis to Arkansas Power & Light Company, effective during the period from November 1, 1942, to July 26, 1943. Mississippi contends that it is entitled to these lower rates given by Memphis to Arkansas Power & Light Company, by reason of the "favored nation" clause quoted above. During the period from November 1, 1942, to July 26, 1943, these lower rates would have saved Mississippi $30,044.53. Memphis billed Mississippi at the rates provided in the September 1, 1934, contract, as amended, and Mississippi deducted $30,044.53 from the billings before payment. Memphis brought this suit for the $30,044.53.

Memphis also entered into an agreement, on March 13, 1939, with its distributor, the Light, Gas and Water Division of the City of Memphis, establishing a rate for gas delivered by Memphis to the city of Memphis. This contract was filed with the Commission on June 15, 1939, and the rates were effective June 27, 1939, to July 25, 1943. Mississippi now contends that it is entitled to the rates given by Memphis to the city of Memphis by reason of the same "favored nation" clause. These rates were lower than those in effect between Memphis and Arkansas Power & Light Company during the period from November 1, 1942, to July 26, 1943. During the period from July, 1939,

to July 25, 1943, the rates set forth in the 1939 agreement between Memphis and the city of Memphis would have saved Mississippi $227,951. Defendant set forth its contention as to this $227,951 in its answer and amended it to counterclaim as to this amount on this appeal.

During the pendency of the suit in the court below, Mississippi, on April 11, 1945, filed with the Federal Power Commission a complaint to determine "the just and reasonable rate for gas delivered at the city gate by Memphis to Mississippi during the period from June 21, 1938, to July 26, 1943, fixing the same by order." The Commission ruled it was without authority to grant the relief requested because:

> "(c) Section 5(a) of the Natural Gas Act authorizes the Commission after hearing to 'determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be *thereafter observed and in force,* and * * * fix the same by order.' (Emphasis supplied.)
>
> "(d) During the period from June 21, 1938, to July 26, 1943, Mississippi filed no protest or complaint with the Commission with respect to the rates charged by Memphis for natural gas sold to Mississippi. During such period, the rates charged by Memphis were regularly on file with the Commission, and the Commission did not fix any rates or charges different from those prescribed in Memphis' rates schedules actually on file with the Commission.*
>
> "* Section 54.2 of Part 54 of the Provisional Rules of Practice and Regulations under the Natural Gas Act provides: 'No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown otherwise provide by order'."

The court below granted judgment for Memphis on the grounds that (1) the "favored nation" clause would give Mississippi no more than the right to use it as the basis for complaint to the Commission. (2) Memphis was under no obligation to ask the Commission to implement a rate to Mississippi already granted to another distributor of Memphis. (3) Until the Commission changed the rate, the contract rate between Memphis and Mississippi was the lawfully promulgated rate.

On this appeal Mississippi urges that the lower court erred in these respects:

1. It ignored the deposition of Henry Sargeant wherein it was shown without contradiction not only that Mississippi and Arkansas were similarily situated, but that Mississippi was, if anything, more entitled to a rate reduction than was Arkansas, because of the fact that it was located nearer to the source of supply and used larger quantities of gas for domestic consumption.

2. It overlooked the facts as shown by the record that Mississippi did not know of the rate reduction to Arkansas until almost two months thereafter, and did not know all of the facts and circumstances surrounding such reductions until some time later; that it immediately protested and was assured by Memphis that its rates under the "favored nation" clause would be given due consideration, and it was requested by Memphis to defer action, pending the general rate investigation of the Memphis rate structure as a whole then in process by the Federal Power Commission.

3. It overlooked the fact that in its findings of fact and conclusions of law there were no findings that Mississippi and Arkansas were not similarly situated; that any such finding would have been contrary to the undisputed testimony; that the lower court arrived at its decision without regard as to whether these two companies were Buyers operating under similar conditions in accordance with the "favored nation" clause; that it was the court's conclusion that Mississippi should have taken this question to the Federal Power Commission, and that the court could not pass on it.

The argument of Mississippi fundamentally is that (1) the "favored nation" clause entitled Mississippi to a lower rate than was set forth in the contract, as amended, filed with the Federal Power Commission, and (2) the failure of Memphis to file a lower rate with the Commission entitled Mississippi to obtain by contractual recovery the advantages of the lower rate.

The "favored nation" clause became inoperative after the passage of the Natural Gas Act. Section 4 thereof provides: "* * * every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation or sale * * *" and "no change shall be made by any natural-gas company in any such rate * * * except after thirty days' notice to the Commission and to the public. * * * Such notice shall be given by filing with the Commission and keeping open for public inspection *new schedules* stating plainly the *change or changes* to be made in the schedule or schedules then in force and *the time when* the change or changes will go into effect." (Emphasis supplied.) While section 4 places the burden of filing a *new schedule* on the natural-gas company, its failure to act did not leave Mississippi, as a distributor of its gas, without a remedy. Section 5 of the same act provides: "Whenever the Commission, after a hearing had upon its own motion or *upon complaint or any* * * * *gas distributing company,* shall find that any rate * * * charged * * * by any natural-gas company * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate * * *." (Emphasis supplied.) No matter how Mississippi may contort the effect of the "favored nation" clause, the act places upon the "gas distributing company," here Mississippi, or the Commission itself the power of instituting a hearing to determine whether a rate is proper under the terms of the act. Under section 5 the Commission may consider discrimination and preference in setting a rate. Rate-making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function.[2] To give effect to the

[2] Colorado Interstate Co. *v.* Federal Power Commission, 324 U. S. 581, 589, 43 Am. Jur. pp. 722-723.

"favored nation" clause would operate to transfer the legislative function of rate-making from the Commission to the courts. For the court to place a contractual duty on Memphis to file a new rate schedule would be tantamount to forcing new rates on Memphis without permitting its recourse to the Commission.

Mississippi argues that, since the Commission has held it may not set retroactive rates, to require it to go before the Commission to obtain a lower rate in advance of deliveries would require it to have instantaneous knowledge of the lower rate extended by Memphis to another customer and would require the Commission to obtain immediate action. Congress has made certain provisions for these hardships, and supplication for further relief must be addressed to that body. Section 4 provides that unless the Commission orders otherwise a natural-gas company must give thirty days' notice to the public before it makes a change in a rate schedule. In absence of proof to the contrary we must assume Memphis complied with this provision or that the Federal Power Commission entered an interim order making the change in rate immediately effective under section 16 of the act.[3]

The judgment appealed from is

Affirmed.

A True copy: Teste.

____ ____,

Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

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[3] This the Commission may do. Hope Natural Gas Co. *v.* Federal Power Commission, 134 F. 2d 287, 311, 1943, 4 Cir.; reversed F. P. C. *v.* Hope Natural Gas Co., 1944, 320 U. S. 591; and F. P. C. *v.* Natural Gas Pipeline Co., 1941, 315 U. S. 575, 583.